

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 29th day of August, Two thousand and six.

PRESENT:

HON. GUIDO CALABRESI,
HON. SONIA SOTOMAYOR,
HON. RICHARD C. WESLEY,
Circuit Judges.

Arben Ndocaj,

Petitioner,

-v.-

No. 06-0778-ag
NAC

Alberto R. Gonzales, Attorney General,
Respondent.

FOR PETITIONER: Robert J. Pures, II, Christophe & Associates, New York, New York.

FOR RESPONDENT: Patrick J. Fitzgerald, United States Attorney for the Northern District of Illinois, Susan M. Haling, Edmond Chang, Craig Oswald, Assistant United States Attorneys, Chicago, Illinois.

UPON DUE CONSIDERATION of this petition for review of the Board of Immigration Appeals ("BIA") decision, it is hereby ORDERED, ADJUDGED, AND DECREED that the

petition for review is DENIED.

Petitioner Arben Ndocaj, a native and citizen of Albania, seeks review of a January 30, 2006 order of the BIA denying his motion to reopen. *In re Arben Ndocaj*, No. A78-507-170 (BIA Jan. 30, 2006). In a previous decision, the BIA affirmed an Immigration Judge's ("IJ") determination that Ndocaj was not credible regarding his claims for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"). *In re Arben Ndocaj*, No. A78-507-170 (BIA July 20, 2004), *aff'g* No. A78-507-170 (Immig. Ct. N.Y. City Sept. 16, 2003). We assume the parties' familiarity with the underlying facts and procedural history.

This Court reviews the BIA's denial of a motion to reopen for abuse of discretion. *Twum v. INS*, 411 F.3d 54, 58 (2d Cir. 2005). An abuse of discretion will be found "in those circumstances where the [BIA's] decision provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary conclusions or statements; that is to say, where the [BIA] has acted in an arbitrary or capricious manner." *Ke Zhen Zhao v. U.S. Dep't of Justice*, 265 F.3d 83, 93 (2d Cir. 2001) (internal citations omitted). In a motion to reopen, this Court is precluded from passing on the merits of the underlying claim for relief, and review must be confined to the denial of the petitioner's motion to reopen the proceedings. *Id.* at 90. Accordingly, only the BIA's denial of Ndocaj's motion to reopen can be reviewed for an abuse of discretion, and this court is unable to reach the merits of the IJ's denial of his asylum, withholding of removal, and CAT claims.

The regulations state that individuals must file a motion to reopen within 90 days of the final order of removal, *see* 8 C.F.R. § 1003.2(c)(2), and there is no dispute that Ndocaj's motion was filed out of time. Ndocaj correctly asserts that his motion to reopen could overcome the late filing if he exercised due diligence in pursuing his claim of ineffective assistance of counsel. *See*

1 *Iavorski*, 232 F.3d 124, 129-34 (2d Cir. 2000); *Ali v. Gonzales*, 448 F.3d 515, 517-18 (2d Cir.
2 2006); *Cecik v. INS*, 435 F.3d 167, 171 (2d Cir. 2006). However, this Court has clearly stated
3 that the BIA does not abuse its discretion in denying a motion to reopen if the movant failed to
4 present any evidence of due diligence. *See Jin Bo Zhao v. INS*, 452 F.3d 154, 157 (2d Cir. 2006).
5 In this case, Ndocaj did not offer any evidence of how he was exercising due diligence during the
6 sixteen-month period between the BIA's denial of his appeal and the filing of his motion to
7 reopen. He stated only that he did not learn of the possibility of filing a motion to reopen until he
8 retained new counsel, but he did not state at what point he decided to hire new counsel.
9 Moreover, based on the fact that Ndocaj's prior attorney returned his fees, it is clear that Ndocaj
10 was aware of his previous attorney's ineffective assistance immediately after the BIA issued a
11 decision on his appeal. Accordingly, the BIA did not abuse its discretion in determining that
12 Ndocaj failed to prove due diligence with respect to his ineffective assistance of counsel claim.

13 Ndocaj argues that the BIA abused its discretion in failing to consider his arguments
14 regarding changed country conditions in Albania, and as a result, this Court should remand the
15 case to the BIA. The government erroneously asserts that the BIA need not discuss the country
16 conditions information because Ndocaj "did not provide a basis for tolling the filing deadline."
17 A change in country conditions is an explicit exception to the 90-filing requirement, *see* 8 C.F.R.
18 § 1003.2(c)(3)(ii). Ndocaj is correct that it was an abuse of discretion for the BIA to fail to
19 consider this basis for reopening. *See Alam v. Gonzales*, 438 F.3d 184, 187 (2d Cir. 2006).

20 However, even when the BIA abuses its discretion in failing to consider part of an alien's
21 claim in his motion to reopen, this Court need not remand the case if doing so would be futile.
22 *Id.* at 187-88; *Wei Guang Wang v. BIA*, 437 F.3d 270, 275-76 (2d Cir. 2006). Even though a
23 change in country conditions could serve as an exception to the 90-day filing deadline, Ndocaj

1 would have had to demonstrate that the country conditions in Albania changed such that they
2 materially affected his claims. *See* 8 C.F.R. § 1003.2(c)(1). In this case, remand would be futile
3 because the country conditions information does not rebut the IJ's original adverse credibility
4 finding. The IJ specifically noted in her decision that she did not believe Ndocaj's assertion that
5 he was a well-known Democratic Party ("DP") activist, and as a result, any change in how DP
6 members are treated in Albania would not materially affect Ndocaj's claims. Since the IJ did not
7 find Ndocaj credible with respect to his membership in the DP in Albania, this Court can
8 confidently predict that the agency would reject Ndocaj's country conditions argument.

9 Accordingly, the petition for review is DENIED. Having completed our review, any stay
10 of removal that the Court previously granted in this petition is VACATED, and the pending
11 motion for a stay of removal in this petition is DENIED as moot.

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14 FOR THE COURT:
15 Roseann B. MacKechnie, Clerk
16

17 By: _____